E. B. BROOKS, JR.

IBLA 85-58 Decided June 25, 1986

Appeal from a determination by the Kremmling Resource Area, Colorado Bureau of Land Management, directing performance of reclamation work on Lease No. C-15302.

Set aside and referred to the Hearings Division.

1. Oil and Gas Leases: Civil Assessments and Penalties -- Rules of Practice: Hearings

   Where there are disputed issues of fact which will be determinative of the legal issues presented, the Board has the authority, in its discretion, to order a hearing on the matter before an administrative law judge pursuant to 43 CFR 4.415.

APPEARANCES: E. B. Brooks, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

E. B. Brooks, Jr., has appealed from a determination of the Area Manager, Kremmling Resource Area, Colorado Bureau of Land Management (BLM), directing him to perform reclamation work as required by an Incident of Noncompliance (INC), issued for a well site on oil and gas lease C-15302. In his determination, the Area Manager specified that reclamation was to be completed within 30 days or action would be taken against appellant's lease bond under 43 CFR 3163.1.

The site in controversy is the "Brooks Government Well #1" located in sec. 13, T. 4 N., R. 77 W., sixth principal meridian. The site is within the Arapaho National Forest and surface jurisdiction is reposed in the Forest Service (FS), U.S. Department of Agriculture.

The subject lease issued on April 6, 1972, with an effective date of May 1, 1972, to F. M. Tully. On September 25, 1972, Brooks was designated the operator by Tully. On September 28, 1972, the Forest Supervisor approved a surface management operating plan for a well scheduled to be drilled to a depth of 2,500 feet, in the NE 1/4 SE 1/4 sec. 13. Section 7 of this plan provided as follows:

7. Rehabilitation

The road will be water-barred and seeded to grass. The culvert at the creek crossing is to be removed. The drill site pad is to be restored by filling in the reserve pit restoring the site to its natural condition. The road and drill site is to be reseeded with the following species and amount:

Smooth Brome	4 pounds per acre
Timothy	3 pounds per acre
Slender Wheatgrass	3 pounds per acre
White Dutch Clover	2 pounds per acre

In addition, native pine seedlings are to be transplanted with a spacing of 8 feet by 10 feet as directed by the District Ranger.

The authorized well was drilled in July 1973, to a depth of 2,504 feet. The well failed to penetrate beyond the Pierre Shale. By letter dated November 29, 1973, the District Ranger, FS, advised the District Engineer, U.S.G.S., that while all of the equipment had been removed from the site, no surface restoration work had been performed. Accordingly, the District Engineer recommended holding the operator's bond until reclamation had been completed.

Brooks, as operator, had filed a well completion report on August 30, 1973, together with a notice of intention to abandon the well. In this notice, Brooks had estimated that the well site would be ready for inspection on September 10, 1973. By letter dated December 10, 1973, the District Engineer, noting the comments of the District Ranger concerning the status of restoration, advised Brooks that abandonment would not be approved until the site was rehabilitated to the FS specifications.

On October 11, 1974, the District Ranger informed Brooks that, while he had been assured that the work would be completed that summer, no restoration work had yet occurred. On October 21, 1974, Brooks' secretary responded that Brooks intended to re-enter the well and deepen it. Responding to this information, the District Ranger advised the District Engineer that any revised operating plan would need FS approval.

On September 8, 1975, the District Ranger advised the District Engineer that the site had not yet been restored. On October 3, 1975, the District Engineer wrote to Tully, relating this fact and concluding that "it appears obvious that Mr. Brooks will not fulfill his obligations as the Designated Operator." Tully was advised that, as lessee, he bore ultimate responsibility and was directed to submit a schedule for compliance within 60 days.

Tully responded by letter of October 9, 1975, noting that he had contacted Brooks who advised him that, because of difficulties in obtaining the proper drilling rig, Brooks had been unable to re-enter and deepen the well so as to penetrate the Muddy, Dakota, and Lakota Sands. Tully stated that Brooks assured him that if he was unable to re-enter that fall he would do so as early next summer as weather and rig availability permitted.

In November 25, 1975, the District Engineer responded:

> Your letter states that Mr. Brooks has assured you that he will deepen the well "early next summer (early summer, 1976) as weather and rig availability permit, and that, in any event, he will properly restore the drill site in accordance with the operating plan." One of the reasons for the requirement of early restoration of drill sites is to prevent undue erosion of the denuded and disturbed surface and deposits of the resulted sediments in drainage channels and streams. This site will be three years old by the summer of 1976. No further delays in restoration of the drill site will be permitted past the summer, 1976.
>
> If operations to deepen the well are resumed in the summer, 1976, restoration must be accomplished immediately after the operations cease.

On April 20, 1976, BLM approved an assignment of 100 percent of record title from Tully to Brooks effective May 1. On May 24, 1976, Brooks filed an application to deepen the well. This application noted an approximate date for commencement of work of June 20, 1976. Brooks had earlier, on May 20, 1976, agreed to another surface operating plan which required the same rehabilitation as the 1972 plan. Permission to re-enter was given on July 30, 1976.

During the course of preparing the site for drilling, the operator increased the drill pad from 90 feet by 120 feet as approved to 265 feet by 120 feet. When this was discovered, the operator was requested to cease operations and did so. On October 4, 1976, Brooks informed the District Engineer that he would not drill the well and would rehabilitate the site. On January 28, 1977, having heard nothing further, the District Engineer directed Brooks to inform Survey by February 18, 1977, as to the condition of the site. By letter dated February 17, 1977, Brooks submitted a Sundry Notice explaining that no reclamation work had been done but that discussions were ongoing with the Forest Service as to deepening the well. Brooks asked that the drilling permit be extended to July 31, 1977.

On August 3, 1977, the Acting District Engineer requested that Brooks advise the office whether he still planned to drill the well, noting that unless a response was received by September 1, approval of the application to deepen the well would be revoked. On August 26, 1977, Brooks responded that "upon availability of the drilling equipment and adequate capital" he proposed to deepen the well.

On August 19, 1978, the Acting District Engineer, noting that no activity had taken place since August 26, 1977, revoked approval of the application to re-enter and informed Brooks that a new application must be submitted should he desire to deepen the well in the future. He was also advised that if no new application was received by June 1, 1978, he would be required to rehabilitate the site on or before October 1, 1978.

On April 24, 1980, the District Engineer, requested that Brooks inform Survey whether or not the site had been rehabilitated. No response appears in the files. 1/ However, from documents subsequently filed it appears that the site may have been rehabilitated sometime in 1979. 2/ In any event, in early April 1982, as the lease was about to expire, Brooks sought once again to re-enter the well. 3/ In light of the environmental conditions then existing, the Forest Service declined to permit occupancy of the site prior to the expiration date of the lease. A suspension of the running of the lease term was approved on June 23, 1982, effective April 1, 1982. 4/ Actual drilling operations were conducted over the extended expiration date (August 31, 1982), and the lease was thereby extended for an additional 2 years pursuant to 43 CFR 3107.2-2; 3107.2-3 (1982) (currently codified at 43 CFR 3107.1).

As a precondition to approval of the APD, the District Ranger had required assent to an amended rehabilitation plan. 5/ The well was deepened to 4,380 feet without achieving production. On October 3, 1982, Brooks filed a notice of abandonment of the well.

1/ The state of the case files, however, leaves much to be desired. Documents appear to have been included at random in no discernible order. This has necessitated the expenditure of an inordinate amount of time in piecing together the chronology of events.

2/ That some rehabilitation work was performed in 1979 can be discerned from a comment made in a letter from the District Ranger to the District Supervisor, Minerals Management Service (MMS), dated Apr. 16, 1982, objecting to a request by Brooks to re-enter the well in April 1982. Therein, it was noted that in 1979 the secondary road to the pad was closed and "access was barricaded, water barred, ripped and reseeded."

3/ It is somewhat paradoxical that during the long period of time (1973-1979) that Brooks failed to rehabilitate the site after the initial completion, Brooks continuously asserted that no action to rehabilitate or, alternatively, re-enter the well was possible except during a short window of time in the summer. But, when it became necessary to conduct initial drilling operations over the expiration date (midnight of April 30), these problems suddenly became less insurmountable.

4/ In light of the lateness of Brooks' efforts to gain approval of drilling operations, the suspension was an act of grace rather than right. See Sierra Club (On Reconsideration), 80 IBLA 251 (1984).

5/ The new rehabilitation plan provided as follows:

"1. No pine seedlings will be planted.

"2. Waterbars shall be drivable with approximately 12" of freeboard. They should be constructed in accordance with the following spacing guidelines.

"2% grade - 200 feet
"2-4% grade - 100 feet
"4-5% grade - 75 feet

"3. Existing 'tank traps' shall be obliterated.

"4. The existing gate shall be reinforced and signed in accordance with the detail shown below. [exhibit omitted.]

"5. Revegetation will be done in accordance with the following plan: "a. The top 4 inches of soil should be worked (scarified) on the countour prior to seeding.

On July 13, 1983, the first INC was issued. It listed the following deficiencies: "1) Pad and access road needs fertilizing, mulching, scarifying, and final reseeding; 2) water bars on access road need improvement." The INC ordered appellant to begin correcting these items within 30 days of receipt of the notice and advised that "Next enforcement action will be assessments of $250 each successive day per incident [cited] above."

On August 22, 1983, a second INC was issued. It noted that surface restoration had not been completed and ordered commencement of the necessary work within 10 days of receipt of the notice, warning that the next enforcement action would be continued assessment of damages. Subsequent to this second INC, Brooks contacted BLM. Brooks informed BLM that he had discussed the matter with Ray Spaulding (with whom Brooks had contracted for rehabilitation of the site) and Spaulding had informed him that no additional work was needed on the location.

By letter dated October 12, 1983, the Acting District Manager notified appellant that he would be assessed $250 per incident, per day, pursuant to 43 CFR 3163.3, beginning August 19, 1983 and ending on the day surface restoration was completed.

In a letter dated December 5, 1983, the Area Manager wrote appellant as follows:

> You became liable for assessments resulting from [the INC] on August 13, 1983. Subsequent inspections have revealed that you have not corrected noted unsatisfactory rehabilitation which could have been corrected as long as favorable working conditions persist at this location. Weather and surface temperature made reclamation work unfavorable after November 4, 1983. You are currently liable for assessment of liquidation damages from August 13 to November 4, 1983.
>
> You can begin work on the rehabilitation of this site by approximately June 15, 1984. A later start date may be necessary

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fn. 5 (continued)

"b. Reseed with a mixture of grasses and forbs as provided below. Apply seed at 30 pounds per acre of pure live seed. Apply a minimum of 200 pounds/acre of nitrogen fertilizer (20-10-5) and mix incorporate into the soil at the time of seeding.

"c. Provide a mulch cover after seeding.

"d. Recommended Species composition:

"Intermediate Wheatgrass 5%	Timothy (variety climax) 10%
"Kentucky Bluegrass (variety troy) 10%	Perennial Rye Grass 15%
"Smooth Brome 10%	White Clover 10%
"Russet Buffaloberry 10%	Russian Wild Rye 10%
"Snowberry 10%	Yellow Sweet Clover 5%
"Feth 5%	

"6. After all construction or operations, or as directed by the District Ranger, the company will remove all materials, equipment, supplies, tailings, trash, etc. from National Forest lands and dispose of in accordance with Grand County sanitation requirements."

if poor working conditions persist. Ten days after work can commence, June 25, 1984 (or later) you will again become liable for assessments until the unsatisfactory rehabilitation is corrected.

Later in December, appellant was sent a Bill for Collection, assessing $19,500 in liquidated damages, payable by January 23, 1984. Appellant responded by letter of January 4, 1984, returning the bill unpaid, contending that the site had been fully restored and disputing the validity of the damages. On January 31, 1984, the District Manager notified appellant that both INC's and Bill for Collection had been properly issued. He also warned that if the damages were not paid by "the third billing" appellant's bond would be attached.

On February 1, 1984, the Area Manager again sent appellant the FS specifications detailing the required restoration work. On September 5, 1984, the Area Manager directed appellant to perform the reclamation work or face action against his lease bond. Brooks thereupon visited the office to seek an explanation of the $19,500 assessment. A note to the files indicates that he was, at that time, advised of his right of appeal. Brooks filed an appeal on September 28, 1984.

In his statement of reasons, appellant asserts:

(1) I inspected the location on 9-18-84 and found that the well location and road had been repaired in September, 1982.

(2) There was grass growing on the road and on the location, even though the location is very rocky and is comprised mostly of granite gravel and boulders. The location had been scarified consistent with the rocky nature, probably with a ripper and bulldozer.

(3) There was no evidence of erosion.

(4) There were vehicle tracks on the road which has stunted or killed some of the grass, and I am unaware of what vehicle traffic is using the road as the required gate is in place.

(5) The grass that was planted was headed out and going to seed, therefore it would appear that the location will ultimately return to its original state. Any further reclamation work would result in a set back to the grasses now growing.

(6) In summary, this one-half acre in the National Forest is rehabilitated so that it presents no problem to anyone, and the work requested in the Incident of Noncompliance appears unneeded, and not desirable, in light of the work previously accomplished, and in light of the over-all environment.

A subsequent BLM memorandum disputes these conclusions:

> This location and access road have not been reclaimed as described in the U.S.F.S. letter dated 8-11-82. This very letter was a condition of the 8-20-82 approv[al]. Photos in the case file show very little (less than .01% compared to 8% for comparable sites) basal vegetation cover. The access road has too few and improperly constructed water bars. Reclamation has not been completed to remotely conform to the conditions imposed with the 8-20-82 approval. I have visited the site several times and it appears that little effort has been expended in the revegetation of the drill site and access road. Water bars in the access road do not approach the approved specification.

Initially, we note that there appears some uncertainty as to the precise issues on appeal. In a memorandum from the Surface Reclamation Specialist to the Area Manager, dated October 18, 1984, it is asserted that "the assessment of $19,500 was not appealed." BLM contends that Brooks has only appealed the decision to proceed against his bond. We do not agree.

The first INC did not purport to assess damages, but merely threatened future assessments. The second INC did contain language referring to continuation of assessments, but, as we noted above, upon receipt of this INC, Brooks contacted BLM and denied that any further rehabilitation work was needed. When a bill for $19,500 was sent, Brooks again denied liability, this time in writing. When Brooks was finally orally informed of his appeal rights he tendered a written appeal denominated as such. The memorandum to the files which documents this discussion clearly shows that it was related to the $19,500 assessment.

We recognize that those dealing with the Department are properly chargeable with knowledge of the applicable regulations, including those related to appellate review of initial BLM decisions. However, in the instant case it is far from clear when the assessment was properly appealable. Certainly, in the absence of any statement by BLM in the two INC's that they were subject to appeal, it is questionable whether they were final determinations subject to appeal. Moreover, even if they were, it would not necessarily follow that failure to appeal the INC's precluded a separate appeal of the actual assessment.

By way of analogy, we note that under the procedural rules which control adjudication of appeals arising under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 (1982), an individual who receives a notice of violation (NOV), and a subsequent civil penalty assessment may file a petition for review within 30 days of receipt of the proposed assessment. In the ensuing hearing, the petition may challenge not only the amount assessed but the underlying question as to the existence of a violation. See generally 43 CFR 4.1150 to 4.1158. Admittedly, no such formalized appellate provisions are applicable to issuance of INC's. Nonetheless, we find that appellant's objection to the assessment, which BLM received on January 11, 1984, was a timely appeal which preserved for appellate review both the fact of violation and the amount of the assessment.

With respect to the assessment, it must be recognized that considerable changes in the manner and amount of assessments under 43 CFR 3163.3 have taken place in the past 2 years. See generally Mont Rouge, Inc., 90 IBLA 3 (1985); Willard Pease Oil & Gas Co., 89 IBLA 236 (1985). Of particular relevance herein is Change 3 to Instruction Memorandum (IM) No. 84-594 (Jan. 4, 1985), establishing maximum "caps" for assessments including those made under 43 CFR 3163.3(a), which served as the basis for the instant assessments. 6/ Moreover, the language authorizing assessments for each successive day of noncompliance was deleted on September 21, 1984, 49 FR 37365. Further examination of this issue, however, would be premature at the present time because of unresolved questions concerning the existence of a violation.

Appellant's position essentially remains that the site is, in fact, rehabilitated. BLM is adamant that considerable work remains to be accomplished. This is essentially a question of fact, which we are unwilling to adjudicate on the present record. Accordingly, we hereby set aside the decisions appealed and refer the matter to the Hearings Division for the assignment of an administrative law judge to conduct a fact-finding hearing. Should the judge find that the site was not rehabilitated according to the Forest Service specifications, he shall then determine the proper assessment pursuant to applicable Departmental regulations, policies, and precedents. Further, should it appear that the site has still not been adequately rehabilitated, the judge shall determine what further action should be undertaken, including invocation of 43 CFR 3163.3(b). Appellant shall have the ultimate burden of persuasion that the site has been correctly rehabilitated. The judge shall issue an initial decision from which any party adversely affected might take an appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the case files are referred to the Hearings Division for further action consistent with the foregoing.

James L. Burski
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

R. W. Mullen
Administrative Judge.

6/ Actually, the INC's cited 30 CFR 221.52(a). This regulation while promulgated at 47 FR 47772 (Oct. 27, 1982), was redesignated as 43 CFR 3163.3(a), when jurisdiction over these matters was transferred from MMS to BLM.